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No.

IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 01-12909

D.C. Docket No. 99-00110-CV-ORL-6-28

HELEN EDWARDS,
CHRISTOPHER EDWARDS,

Plaintiffs-Appellants,

versus

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC., OF FLORIDA,

Defendants-Appellees,

CITY OF TITUSVILLE, Florida,
SEARSTOWN MALL ASSOCIATION, INC.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(January 4, 2002)

Before WILSON, HILL and FAY, Circuit Judges.

PER CURIAM:

Helen Edwards and Christopher Edwards brought this action against Acadia Realty Trust, Inc., and Wells Fargo Guard Services, Inc., of Florida alleging violations of 42 U.S.C. §§ 1981, 1983, 1985 and 1986. After a hearing, the district court granted summary judgment to defendants on all claims. The Edwards filed this appeal.

We have considered the arguments of counsel, presented both in their briefs and at oral argument. We have also carefully reviewed the record, including the orders of the district court. Finding no reversible error therein, the judgment of the district court is **AFFIRMED.**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,
Plaintiffs,

-vs- Case No. 6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,
Defendants.
_____/

ORDER

Plaintiffs brought this action against Acadia Realty Trust, Inc. ("Acadia"), City of Titusville ("Titusville"), SearsTown Mall Association, Inc. ("STMA"), and Wells Fargo Guard Service, Inc. of Florida ("Wells Fargo") alleging that their rights were violated because of their opposition to Defendants' racial discrimination against others. Plaintiffs contend that they were improperly "trespassed" from the SearsTown Mall in Titusville after they complained about Defendants' treatment of black children at the mall.

This cause is currently before the Court on Acadia's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 58) and Wells Fargo's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 63). STMA and Titusville also filed Motions to Dismiss (Docs. 59 and 61); however, Plaintiffs' claims against those Defendants have been settled and those motions, as well as others relating to those Defendants, will be denied as moot.

Since the issuance of a Report and Recommendation on the foregoing motions, Plaintiffs have filed a Motion To Amend (Doc. 167)

with an attached proposed Verified Fourth Amended Complaint, and a Motion to Supplement or Amend Complaint (Doc. 177) with an attached proposed Verified Fifth Amended Complaint. This Order addresses those Motions as well.

1. Motions to Dismiss (Docs. 58 and 63)

The United States Magistrate Judge has submitted a Report and Recommendation (Doc. 94) recommending that the Defendants' Motions (Docs. 58 and 63) be granted in part and denied in part.[1] All parties have filed Objections to the Report and Recommendation,[2] and all parties have filed Responses to the respective Objections.[3]

After an independent review of the applicable law and the record in this matter, including the

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1Specifically, and as discussed in more detail in the text of this Order, the Report recommends that Count I of the Third Amended Complaint be dismissed as to Defendant Titusville only; that Count II of the Third Amended Complaint be dismissed in its entirety as to Defendant STMA; that Count II of the Third Amended Complaint be dismissed as to Defendants Acadia, Titusville, and Wells Fargo on Plaintiffs' claims of freedom of association and right to petition; that Count III of the Third Amended Complaint be dismissed as to all four Defendants; that Counts IV and V be dismissed as to all four Defendants; that Plaintiffs' claims seeking injunctive relief be dismissed; and that the Motions to Dismiss be denied in all other respects. As noted in the text, the issues relating to Defendants STMA and Titusville are now moot.

2(Docs. 130, 132, and 134).

3(Docs. 145, 149, and 150).

Objections and Responses filed by the parties, the Court agrees almost entirely with the conclusions in the Report and Recommendation, as more specifically set forth below.[4] Accordingly, Defendants' Motions will be granted in part and denied in part.

A. Pleading Requirements

The Report correctly notes that in reviewing a motion to dismiss, this Court must view the complaint in the light most favorable to the Plaintiff and that a complaint should not be dismissed "unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief." (Doc. 94, at 5) (citing Scheuer v. Rhodes, 416 U.S. 232 (1974), and Conley v. Gibson, 355 U.S. 41(1957)). However, the Report also states that "in the context of civil rights, there is a heightened pleading requirement and the plaintiff must 'allege with some specificity the facts which make out its claim.'" (Doc. 94, at 5) (quoting GJR Invs., Inc. v. County of Escambia, Florida, 132 F.3d 1359, 1367 (11th Cir. 1998)).

In their Objections (Doc. 134), Plaintiffs contest the Report's statement regarding a heightened pleading requirement. They argue that the holding of GJR has been abrogated and that there is no heightened pleading requirement in civil rights cases. Plaintiffs further argue that even if GJR remains good law, its "heightened pleading requirement" relates only to qualified immunity of government officials, which is not at issue here. The Defendants do not respond to this argument

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4In the interest of consistency, this Order to the extent possible follows the format and order of discussion used in the Report and Recommendation.

regarding the validity and/or applicability of GJR; only Wells Fargo mentions this contention (Doc. 150), asserting that regardless of whether a heightened pleading standard or a "regular" pleading standard applies, Plaintiffs have failed to allege sufficient facts in support of their civil rights claims.

In GJR, the plaintiff filed suit against the county and four individual defendants under 42 U.S.C. § 1983 for alleged constitutional violations. The defendants moved to dismiss based on qualified immunity. In discussing the qualified immunity defense, the Eleventh Circuit discussed a "heightened pleading requirement":

> [W]hile Fed. R. Civ. P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff **allege with some specificity the facts which make out its claim**. Some factual detail in the pleadings is necessary to the adjudication of § 1983 claims. This is particularly true in cases involving qualified immunity, where we must determine whether a defendant's actions violated a clearly established right. Accordingly, when reviewing a district court's disposition of a motion to dismiss a § 1983 claim on qualified immunity grounds, we are guided by the regular 12(b)(6) standard and by the heightened pleading requirement.

132 F.3d at 1367 (citations omitted) (emphasis added). The bolded portion above is quoted in the Report and Recommendation in support of the proposition that there is a heightened pleading requirement in civil rights cases.

In the instant case, there are no claims against individual defendants and no defense of qualified immunity. Hence, Plaintiffs appear correct that GJR is distinguishable. In any event, the United States Supreme Court has held that there is **not** a heightened pleading requirement in section 1983 actions. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993));[5] see also Rey v. Kmart Corp., 1998

5In Leatherman, the Court stated:

> We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), we said in effect that the Rule meant what it said:
>
> > "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."
>
> Id., at 47, 78 S.Ct., at 103 (footnote omitted).
>
> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[i]n all

averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius.

The phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in Monell, supra, where we for the first time construed § 1983 to allow such municipal liability. Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

507 U.S. at 168-69.

WL 656070, *2 (S.D. Fla. July 21, 1998) ("[T]he Court will not apply a standard of heightened specificity, more stringent than the usual pleading requirements of the civil rules, in cases alleging liability under § 1983.") (citing Leatherman). Therefore, Plaintiffs need not satisfy a "heightened" pleading requirement, and no such requirement has been imposed in ruling on Defendants' Motions to Dismiss in this Order. To the extent the Report and Recommendation states otherwise, the Report will not be adopted as the Order of this Court. However, the Court agrees with the rest of the Report's conclusions even under the "regular" standard of pleading.

B. Standing

The Report concludes that Plaintiffs have standing to raise the civil rights claims that they allege even though they are not members of a minority. After considering the arguments raised in the objections filed by Wells Fargo and Acadia (Docs. 130 and 132), the Court agrees with the conclusion in the Report that Plaintiffs have sufficiently alleged that they have standing to bring the instant claims.

C. Counts II and III -- Claims Under 42 U.S.C. § 1983

In Count II of the Third Amended Complaint, Plaintiffs allege a claim under 42 U.S.C. § 1983 for violation of their rights of free speech, petition, and association under the First and Fourteenth Amendments. The Magistrate's Report recommends, as against Defendants Acadia and Wells Fargo, dismissal of Count II as it relates to

freedom of association and right to petition but not as it relates to the claimed violation of free speech rights. Count III of the Third Amended Complaint alleges violation of 42 U.S.C. §1983--race-based denial of public accommodation under the Equal Protection Clause of the Fourteenth Amendment. The Report recommends dismissal of this Count in its entirety.

As noted in the Report and Recommendation, "[a] successful section 1983 action requires a showing that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the complainant of rights, privileges, or immunities secured by the Constitution or laws of the United States." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156-57 (1978)). Each of these elements will be addressed in turn, along with the appurtenant issues addressed in the Report.

1. State Action

The Report concludes that Plaintiffs have sufficiently alleged state action as to Defendants Wells Fargo and Acadia because Plaintiffs have "alleged that there was a policy or custom to automatically implement and enforce the demands of property owners even if those requests were discriminatory." (Doc. 94, at 10). Accordingly, the Report recommends that Counts II and III not be dismissed against Wells Fargo or Acadia on the basis of lack of state action.

The Court agrees with the Report that under Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975),[6] Plaintiffs have sufficiently alleged

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6In Bonner v. City of Prichard, 661 F.2d 1206(11th Cir. 1981) (en banc), the Eleventh

that Wells Fargo and Acadia acted in concert with the police pursuant to a custom or plan so as to render Wells Fargo and Acadia state actors, at least for the purposes of the Motions to Dismiss. Hence, the motions to dismiss on this basis will be denied.

2. Respondeat Superior (Acadia)

The Report notes that despite the general rule that a corporation cannot be strictly liable on section 1983 claims based on respondeat superior, a corporation may be held liable for the unconstitutional acts of employees where there is a "policy, custom, or action by those who represent official policy" which causes the injury. The Report then recommends that Acadia's motion to dismiss on respondeat superior grounds be denied because "Plaintiffs have alleged a custom or policy of violating rights and evading duties to follow nondiscriminatory policies." (Doc. 94, at 11). Upon consideration, the Court agrees that Plaintiffs have sufficiently alleged an official policy for the purposes of the motions to dismiss.

3. Intention to Violate Rights of Free Speech. Petition. and Association

a. Free Speech

The Report concludes that Plaintiffs have sufficiently alleged a violation of their free speech rights against Acadia and Wells Fargo to survive the motions to dismiss. Distinguishing Lloyd Corp. v. Tanner, 407 U.S. 551(1972), the Report concludes that "it does not appear that Plaintiffs' speech

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Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down through September 30, 1981.

would have been effective had they been in any location other than within the mall where the discrimination occurred." (Doc. 94, at 14). The Report further concludes that "[e]ven if the mall were found to be a nonpublic forum, the restrictions would need to be 'content-neutral and reasonable' to pass constitutional muster." (Doc. 94, at 14). The Report concludes that Plaintiffs have alleged that the restrictions are not content-neutral inasmuch as the "trespass" was allegedly based on the content of their speech. The Court agrees with the Report's conclusions, and Plaintiffs free speech claims are sufficiently alleged to survive the motions to dismiss.

b. Freedom of Association

As noted above, the Report recommends dismissal of the freedom of association claims against all Defendants. The Report notes that there are two forms of constitutionally protected association -- "intimate association" and "expressive association." See. e.g.. Cummings v. DeKalb County, 24 F.3d 1349 (11th Cir. 1994). The Report concludes that Plaintiffs have failed to allege either of these types of association and that therefore their claims should be dismissed. As to "expressive association," the Report states, "Plaintiffs have not alleged that they were associating with the minorities at all, and not for the purpose of expressing their First Amendment rights." (Doc. 94, at 15).

Despite Plaintiffs' objections to the Report's recommendation, the Court agrees that Plaintiffs have failed to allege either expressive or intimate association with the black children. Accordingly, Plaintiffs' freedom of association claims will be dismissed.

c. Freedom of Petition

In their objections (Doc.- 134), Plaintiffs concede that their right-to-petition claim should be dismissed. Accordingly, this portion of Count II will be dismissed.

4. Violation of Equal Protection

The Report concludes that Plaintiffs' equal protection claims (Count III) should be dismissed because Plaintiffs have not alleged that "they were treated differently than any other person who was trespassed or than any other person who arguably interfered with the guards' performance of their duties." (Doc. 94, at 16). The Court agrees with this conclusion, and accordingly Count III will be dismissed.

D. Count I-- Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981

In Count I of their Third Amended Complaint (Doc. 57), Plaintiffs allege a claim under 42 U.S.C. § 1981 for race-based denial of a public accommodation. Plaintiffs contend that they were denied the right to full and equal benefit of laws when they were prohibited from entering the mall for two years.[7] In the Report (Doc. 94), the United States Magistrate Judge recommends that this Count not be dismissed against Acadia or Wells Fargo.

1. Enumerated Rights

As noted in the Report, 42 U.S.C. § 1981 provides:

7Plaintiffs acknowledge that this prohibition was rescinded after a few months (Doc. 77).

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> ***
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> ***
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

The Report concludes that Plaintiffs have sufficiently alleged a cause of action against Wells Fargo under this provision because they have alleged that their "trespass" from the mall "affected their ability to contract with merchants in the mall" and "that they were punished in a discriminatory manner and were not treated equally with those who did not defend minorities." (Doc. 94, at 17-18). The Court agrees with the Report's conclusion, and Wells Fargo's motion to dismiss will not be granted on this basis.

2. Racial Animus

The Report concludes that Plaintiffs have "clearly alleged in their complaint that the actions of the Defendants were motivated by racial animus

in that they were 'trespassed' for defending the rights of minorities." (Doc. 94, at 18). The Report thus concludes that Wells Fargo's motion to dismiss on this ground should be denied. The Court agrees with this recommendation.

3. Claims Against State Actors May Only Be Brought Under 42 U.S.C. § 1983

The Magistrate Judge concluded in the Report that any claims against state actors must be brought under 42 U.S.C. § 1983 rather than 42 U.S.C. § 1981 under the decision of the United States Supreme Court in Jett v. Dallas Independent School District, 491 U.S. 701(1989).[8] The Magistrate noted that although the law in the Eleventh Circuit was (at the time of the Report) unsettled as to the continued validity of Jett following the enactment of the Civil Rights Act of 1991, the Magistrate noted that courts in this Circuit have continued to rely on the Jett decision as unaltered by the 1991 Act, even though other courts have found Jett to have been overruled by the legislative change. See. e.g., Federation of African-American Contractors v. Oakland, 96 F.3d 1204 (9th Cir. 1996).

Since the issuance of the Report and Recommendation the Eleventh Circuit has ruled on this question in accord with the conclusion in the Report and Recommendation. In Butts v. County of Volusia, 222 F.3d 891, 892 (11th Cir. 2000), the Court "conclude[d that] the amendments [in 1991]

8Although the discussion on this point in the Report relates to Titusville - the claims against whom have now been settled -- the analysis is also applicable to Acadia and Wells Fargo insofar as they are alleged to be state actors.

did not change § 1981[,] and § 1983 contains the sole cause of
action against state actors for violations of § 1981." Hence, the Magistrate Judge correctly concluded that Plaintiffs cannot bring a claim against state actors under § 1981 but must instead pursue such claims under § 1983 only.

As noted above, the Report concludes that Plaintiffs sufficiently allege state action by Acadia and Wells Fargo to withstand the motions to dismiss as to the § 1983 claims. The Report explains that if Acadia and Wells Fargo are found to be state actors, the § 1981 claim against them should be dismissed but that if they are not found to be state actors, the § 1981 claim against them can proceed. Hence, the Report recommends that the § 1981 claim against Acadia and Wells Fargo "be allowed as alternative pleading at this stage of the case." (Doc. 94, at 19). The Court agrees with this recommendation, and Plaintiffs may alternatively plead their § 1981 and § 1983 claims.

E. Counts IV and V -- Conspiracy to Deny Rights Under 42 U.S.C. § 1985(3) and Violation of 42 U.S.C. § 1986

In Count IV of the Third Amended Complaint, Plaintiffs allege that the Defendants conspired to deny their rights, in violation of 42 U.S.C. § 1985(3). In Count V, Plaintiffs allege violation of 42 U.S.C. § 1986. The Magistrate's Report recommends dismissal of both of these Counts in their entirety because "Plaintiffs have not pleaded even general facts sufficient to support a conspiracy claim." (Doc. 94, at 20). Plaintiffs object to this conclusion but acknowledge "that lack of a § 1985 claim will preclude a claim under § 1986." (Doc. 134, at 11). After considering Plaintiffs' objections to this recommendation and the Defendants' responses thereto, the Court agrees with the conclusion in the

Report that Plaintiffs have not sufficiently alleged a cause of action under 42 U.S.C. § 1985(3) or 42 U.S.C. § 1986. Accordingly, the motions to dismiss Counts IV and V will be granted.

F. Injunctive Relief

In their Third Amended Complaint, Plaintiffs demanded injunctive relief in addition to seeking damages. The Report recommends dismissing the claim for injunctive relief in light of Plaintiffs' concession in a later pleading (Doc. 77) that rescission of the "trespass" nullified the need for injunctive relief. Plaintiffs have not objected to this portion of the Report and Recommendation, and the Report correctly concludes that, as acknowledged by Plaintiffs in a prior document (Doc. 77), the request for injunctive relief is moot and should be dismissed as such.

II. Plaintiffs' Motions to Amend (Docs. 167 and 177)

Plaintiffs have filed two Motions to Amend (Docs. 167 and 177) since the issuance of the Report and Recommendation. Attached to one Motion (Doc. 167) is a proposed Verified Fourth Amended Complaint, and attached to the other Motion (Doc. 177) is a proposed Verified Fifth Amended Complaint which purportedly amends the proposed Verified Fourth Amended Complaint.

In support of their Motions, Plaintiffs contend that amendment is necessary in light of an alleged change in Eleventh Circuit case law, i.e. Butts, and to add a "companion" claim under 42 U.S.C. § 1982 for race-based denial of property rights. Acadia has filed responses (Docs. 172 and 182) in opposition to Plaintiffs' motions.

Plaintiffs filed their Third Amended Complaint in November 3, 1999 and did not move for leave to again amend until July 2000--- sixteen

months after they filed their first complaint in a case which was originally scheduled to be tried eighteen months after it was filed. The instant motions for leave were also filed after the United States Magistrate Judge had issued a Report and Recommendation regarding the motions to dismiss the Third Amended Complaint and after all parties had filed objections and responses to the Report. Plaintiffs have not alleged any basis for not stating a claim under 42 U.S.C. § 1982 earlier. Additionally, the second Motion (Doc. 177) was filed nearly two months beyond the deadline for filing of motions to amend pleadings established by the Amended Case Management and Scheduling Order (Doc. 137, filed June 1, 2000). Although Plaintiffs' Motion for Leave to File a Fourth Amended Complaint (Doc. 167) was filed on the last day for motions to amend pleadings pursuant to the amended case schedule, the original deadline for motions to amend was May 15, 2000 and was not extended until the Amended Case Management and Scheduling Order was entered on June 1, 2000. Additionally, all parties had filed dispositive motions based on the Third Amended Complaint nearly two months prior to the filing of the first of the motions at issue here (Doc. 167).

Although leave to amend is to be "freely given when justice so requires," Fed R. Civ. P. 15(a), the Court finds that justice does not require allowing Plaintiffs to amend their complaint again. Plaintiffs have already amended their complaint three times, and the parties have expended significant resources arguing the merits of the motions to dismiss the Third Amended Complaint. Although Plaintiffs argue that their prior amendments were merely to add parties or to cure defects identified by the Court, Plaintiffs must avail themselves of the leave they are given rather than assuming that repeated requests for leave to amend will be granted. Plaintiffs filed the instant motions to amend

approximately eighteen months after the initial complaint was filed and nine months after the Third Amended Complaint was filed. Defendants point out that Plaintiffs were aware of the facts giving rise to the proposed § 1982 claim at the time the initial complaint was filed, and discovery was completed or nearly completed at the time the motions for leave to amend were filed. Moreover, the Court does not agree with Plaintiffs that the Butts decision necessitates leave to amend. Under these circumstances, the interests of justice do not require that Plaintiffs be permitted to amend their complaint yet again. Cf. Foman v. Davis, 371 U.S. 178, 182 (1962) (noting that bases for denying leave to amend include "repeated failure to cure deficiencies by amendments previously allowed" and "undue delay"); Brewer-Giorgio v. Producers Video Inc., 216 F.3d 1281(11th Cir. 2000) (finding no abuse of discretion in district court's denial of leave to amend where, inter alia, plaintiff sought to amend more than a year after original complaint was filed and plaintiff did not justify the delay). Plaintiffs shall be permitted to proceed only with the claims remaining in the Third Amended Complaint after issuance of this Order.

CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Report and Recommendation (Doc. 94) is **ADOPTED** and **CONFIRMED** and made part of this Order except as specifically excluded by this Order.

2. The Motions to Dismiss (Docs. 58 and 63) are **GRANTED in part** and **DENIED in part.**

3. Plaintiffs freedom of association and freedom of petition claims in Count II of the Third Amended Complaint (Doc. 57) are **DISMISSED.** The

freedom of speech claims in Count II remain pending, as does Count I.

4. Counts III, IV, and V of the Third Amended Complaint (Doc. 57) are **DISMISSED.**

5. Plaintiffs' claims for injunctive relief are **DENIED** as moot.

6. Plaintiffs' Motion to Amend (Doc. 167) is **DENIED.**

7. Plaintiffs' Motion to Supplement or Amend Complaint (Doc. 177) is **DENIED.**

8. Defendant SearsTown Mall Association, Inc.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 59) is **DENIED as moot.**

9. Defendant City of Titusville's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 61) is **DENIED as moot.**

10. Plaintiffs' Motion for Partial Summary Judgment Against Defendant City of Titusville (Doc. 96) is **DENIED as moot.**

11. Defendant SearsTown Mall Association, Inc.'s Dispositive Motion for Summary Final Judgment (Doc. 125) is **DENIED as moot.**

12. Defendant City of Titusville's Motion for Summary Judgment (Doc. 126) is **DENIED as moot.**

DONE and **ORDERED** Chambers, Orlando, Florida this 10 [sic] day of January, 2001.

/s
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,
Plaintiffs,

-vs- Case No.
6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,
Defendants.
_____/

ORDER

Plaintiffs brought this action alleging that their rights were violated as a result of their opposition to racial discrimination by Defendants against third parties. In Plaintiffs' Third Amended Complaint (Doc. 57), Plaintiffs alleged five counts against four Defendants -Acadia Realty Trust, Inc. ("Acadia"), Wells Fargo Guard Service, Inc. of Florida ("Wells Fargo"), Searstown Mall Association, Inc. ("STMA"), and the City of Titusville ("Titusville'). The claims against STMA and Titusville have been settled, leaving only Acadia and Wells Fargo as Defendants herein. Additionally, this Court previously dismissed Counts III, IV, and V of the Third Amended Complaint as well as a portion of Count II (Order, Doc. 207). The only remaining claims are Count I (race-based denial of public accommodation under 42 U.S.C. § 1981) and part of Count II (violation of free speech rights --42 U.S.C. § 1983).

This cause is now before the Court on several motions for summary judgment and partial summary judgment: Plaintiffs' Motion for Partial Summary Judgment Against Defendants Acadia Realty Trust, Searstown Mall Association, and Wells Fargo of Florida Guard Services (Doc. 98); Defendant, Acadia

Realty Trust Inc.'s Motion for Final Summary Judgment and Supporting Memorandum of Law (Doc. 106); Defendant Wells Fargo Guard Services, Inc.'s Response in Opposition to Plaintiff s Motion for Partial Summary Judgment and Dispositive Cross Motion for Summary Judgment and Incorporated Memorandum of Law (Doc. 139); and Plaintiffs' Second Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Doc. 178). Upon consideration of the record in this matter, oral argument presented by the parties on January 12, 2001, and pertinent case law and as more specifically set forth below, the Court concludes that there are no genuine issues of material fact remaining, that Plaintiffs' motions should be denied, that Defendants' motions should be granted, and that judgment should be entered in favor of Defendants on all remaining claims in this matter.

I. Factual Background[1]

Plaintiffs are residents of Titusville, Florida and are "not of the Negro race." (Third Amended Complaint, Doc, 57, ¶ 2). The SearsTown Mall in Titusville has numerous tenants, including Sears, a beauty supply store, a State of Florida unemployment office, a movie theater, and at least one restaurant. Defendant Acadia owned the mall until late January or early February 1999, at which time the mall was sold to Defendant STMA. Defendant Wells Fargo provided security services for the mall.

On the evening of November 20, 1998, Plaintiffs went to the mall with their two sons and a friend of their sons. While the boys saw a movie, Plaintiffs ate dinner at a mall restaurant. While they

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1The facts are largely undisputed; in areas of dispute, unless otherwise noted Plaintiffs' version of events has been conveyed.

ate, they noticed five black girls -- ranging in age from five years to mid- to late teens -- eating in an adjacent booth. Plaintiffs describe the girls, who were not accompanied by an adult, as well-behaved in the restaurant.

After finishing dinner, Plaintiffs walked through the mall, browsed in the Sears store, and then sat down on a bench outside the movie theater to wait for their children. As the Edwardses were proceeding from Sears to the bench, they observed the five black girls whom they had seen in the restaurant standing nearby. Two security guards approached the girls, and one of the guards asked the girls in an authoritative voice what their business was. The girls responded that they were waiting for their parents, and the guard told the girls they needed to leave. According to the Edwardses, the oldest girl told the guard that they needed to wait inside until their parents came to pick them up. The guard replied that he did not care and that the girls needed to "get [their] asses out of here"; Mrs. Edwards testified in her deposition that the guard used the term "black asses" although Mr. Edwards did not report this terminology. The girls then walked outside the mall.

The Edwardses sat on a bench for ten to fifteen minutes waiting for their children to emerge from the movie theater. While they sat there, the security guards approached two or three unaccompanied teenage black boys in front of the movie entrance. One guard asked the boys what they were doing. When one of the boys responded that they were going to the movies, the guard replied, "Then you need to get there." The boys went into the movie theater. At that time, Mrs. Edwards did not feel that the guards had treated the boys improperly (Helen Edwards Dep., Doc. 111, at 48).

Just after the black boys walked into the movie theater, and while the Edwardses were still seated on the bench outside the theater, the five black girls came back inside the mall and walked toward the

telephone behind the Edwardses. The girls made a telephone call and then proceeded into a nearby retail store. The guards followed the girls into the store, about three or four feet behind. The girls looked around in the store and then left, with the guards still following them. One guard again told the girls that they needed to go outside, and the girls then exited the mall.

As the guards were following the black girls out of the retail store, Mrs. Edwards asked the guards if the girls had done something wrong. One guard told Mrs. Edwards it wasn't any of her business. Mrs. Edwards pointed out that the girls had told the guards they were waiting for their parents and were not supposed to be outside. The guard responded, "They don't belong here" or "They have no business here." Mrs. Edwards told the guard that she had watched the guard follow the girls around and throw the girls out twice and opined that the guard was discriminating against the girls based on their race. The guard told Mrs. Edwards to shut her mouth and stay out of it. Mrs. Edwards told the guard he had no right to tell her to shut her mouth. According to the Edwardses, the guard then pulled out his flashlight, put it in Mrs. Edwards's face, and again told her to shut her mouth or he would have a trespass warning issued against her. Mr. Edwards then told the guard to leave Mrs. Edwards alone. The guard said he was going to call the police and left.

The Edwardses saw other children in the mall that evening, but they have identified only two other sets of unaccompanied children - one group of white children sitting on a bench eating pizza purchased at the restaurant and one group of white girls who made a phone call. The white girls were, according to the Edwardses, the loudest group in the mall, and they asked the Edwardses for change for the phone, which the Edwardses provided. The Edwardses did not complain about the children, and the Edwardses had no knowledge as to whether the guards saw those

unaccompanied groups of children that evening or whether the guards inquired about their business or escorted them outside at some point that night.

According to the security guard, Andrew Bankowski, the black girls had told him they were supposed to have gone to a 7:00 movie but they instead had left the mall and came back inside at about 8:15. When the girls went into the store, a sales clerk in the store motioned for him to go into the store and he did so and then followed the girls out. Bankowski stated in his deposition that he was taking the children outside because the movies were about to let out and the security guards oversee children outside for their safety and security. Bankowski explained that it is better from a security standpoint for the children to be in the well-lighted area outside where the security guards can observe them directly. Additionally, parents picking up their children park outside and do not want to have to go inside the mall to retrieve their children. Bankowski tried to explain the situation to Mrs. Edwards when she confronted him, but she would not listen; Mrs. Edwards acknowledged in her deposition that she "didn't give [Bankowski] a chance" to explain his actions (Helen Edwards Dep., Doc. 111, at 66).

After Bankowski left to call the police, the Edwardses' children came out of the movie theater and they all proceeded to the parking lot. The police had arrived, and they issued a trespass warning against the Edwardses, barring them from returning to the mall premises for two years. When the Edwardses asked the reason for the trespass warning, the police said it was because the guards had requested that the trespass warning be issued. According to the Edwardses, they explained to the officers that the guards had requested the trespass warning because of their opposition to the harassment of the black girls. The police officer suggested that the Edwardses contact the mall management the next day to straighten out the

matter of the trespass warning.

The Edwardses did not contact the mall the next day as suggested by the police officers, nor did they complain to the police, the city, or Wells Fargo. Instead, the Edwardses consulted with an attorney. The instant lawsuit was filed in this court on February 1, 1999 (Doc. 1). On February 9, 1999 -- after the instant case had been initiated -- Mr. Edwards for the first time called Debra Hardy, the manager of the mall,[2] to request rescission of the trespass warning (Christopher Edwards Dep., Doc. 109, at 175). It is undisputed that the trespass warning was revoked about ten days later.

Mrs. Edwards testified at her deposition that neither she nor her family had any other encounters with the mall security guards before or after the November 1998 incident except on one occasion after the trespass warning had been rescinded.[3] In the later incident, her sons and nephew were walking through the mall while Mr. and Mrs. Edwards ate dinner at a mall restaurant. The security guards approached the unaccompanied Edwards children and told them to get back with their parents. There was no indication to Mrs. Edwards that the guard recognized the children as hers or that the guard's actions on that occasion were motivated by skin color. Mrs. Edwards testified that the day the security guards approached her children was the only time her children had been in the mall unaccompanied by an adult.

2Hardy was employed as the mall manager at all relevant times hereto - she was employed by Acadia at the time of the November 20, 1998 incident, and after the mall was sold in early 1999 she continued as mall manager in the employ of STMA.

3This incident apparently occurred around Thanksgiving 1999.

II. Legal Discussion

Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. In ruling on a motion for summary judgment, "'[t]he function of the court is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial.'" Lockett v. Wal-Mart Stores. Inc., 2000 WL 284295, *2 (S.D. Ala. Mar. 8, 2000) (quoting Anderson, 477 U.S. at 249).

When faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). "The evidence presented cannot consist of conclusory allegations or legal conclusions." Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991); see also Fed. R. Civ. P. 56(e) (providing that nonmovant's response "must set forth specific facts showing that there is a

genuine issue for trial").

Count I -- Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981

In Count I of their Third Amended Complaint, Plaintiffs bring claims against Acadia and Wells Fargo for race-based denial of a public accommodation under 42 U.S.C. § 1981.[4] Plaintiffs contend that they

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4This section provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are

were denied the right to full and equal benefit of the laws when they were issued the trespass warning and banned from the mall.

In order to prevail on a claim under section 1981, a plaintiff must establish, inter alia, intentional race-based discrimination. As the court noted in Smith v. Dallas County Bd. of Educ., 480 F. Supp. 1324 (S.D. Ala. 1979):

> The [s]ine qua non of a complaint under section 1981 is a showing of racial discrimination . . . .
>
> The Court recognizes that motive and intent are crucial in determining whether an alleged violation of section 1981 has occurred. But just because racial animus is important, that does not suspend the application of Rule 56. In response to the motion for summary judgment the plaintiffs presented no significant probative evidence either to support the allegations of racial discrimination in the complaint or to show that a genuine issue as to a material fact exists. Simple dissatisfaction with the results of the testing does not translate into racial discrimination. The Court is satisfied that whatever the results of the academic placement testing is in Dallas County no racial animus is present. Accordingly, the defendants' motion for summary judgment as to the section 1981 claim is granted.

480 F. Supp. 2d at 1336 (citations omitted).

In the instant case, as in Smith, Plaintiffs have failed to present any evidence creating a genuine

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> protected against impairment by nongovernmental discrimination and impairment under color of State law.

issue of fact as to racial animus. First, as to Acadia, there is absolutely no evidence of discriminatory intent or even any involvement in the November 20, 1998 incident. There was no mall manager present at the time of the incident, and Plaintiffs had no contact with anyone at the mall until February 1999 -- after which the trespass warning was soon rescinded. Plaintiffs have presented no evidence of a mall policy to discriminate, and there is no evidence that Acadia directed Wells Fargo to act in a discriminatory manner, acted in concert with Wells Fargo, or was even aware of Bankowski's alleged discriminatory actions until Mr. Edwards called Hardy in February 1999 to have the trespass warning rescinded. Hence, there is no evidence that Acadia acted with the discriminatory intent required for recovery under section 1981.

As to Wells Fargo, the record evidence -- including the statement by Mrs. Edwards that her own, white children were asked to go back to their parents by the security guards on the only occasion when they were not accompanied by an adult -- points to neutral actions by the guards regarding *unaccompanied children* in general rather than *children of a certain race or color*. The fact that the Edwardses saw the security guards -- during approximately fifteen minutes seated on a bench in one particular area of the mall -- question two groups of unaccompanied black children regarding their business at the mall and ask the girls to wait outside does not in and of itself constitute probative evidence of racial discrimination. Plaintiffs admit that they did not feel that the guards acted improperly toward the boys, that they have no knowledge or evidence of whether the guards noticed any other groups of unaccompanied children that evening, and that they have no knowledge or evidence of whether the guards in fact escorted any other children out of the mall on the evening of the incident. At best, Plaintiffs have presented a mere scintilla of evidence of intent, which

is not sufficient to preclude summary judgment. In short, no reasonable jury could find discriminatory intent on this record. See Anderson, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."); accord Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997); see also Bibbs v. Bd. of Trs., 9 F. Supp. 2d 964, 973-74 (N.D. Ill. 1998) (granting summary judgment where there was "not a scintilla of evidence" of racial animus and "the undisputed evidence would not allow a reasonable jury to return a verdict in support of [the] claim of racial discrimination"), aff'd, 191 F.3d 455 (7th Cir. 1999); cf. Brantley v. Runyon, 1999 WL 195658, *4 (6th Cir. Mar. 8, 1999) (noting that plaintiff's contention that supervisor's "perception was based on racial stereotyping is sheer speculation and conjecture"); Reyes v. City of Dinuba, 1992 WL 289553, *1 (9th Cir. Oct. 14, 1992) (affirming summary judgment where "racial animus [could] not reasonably be inferred from the evidence"); Zephyr v. Ortho McNeil Pharm., 62 F. Supp. 2d 599, 607 (D. Conn. 1999) (granting summary judgment where case "present[ed] the Court with nothing more than pure and legally inadequate speculation that racial animus motivated the alleged discriminatory treatment of the plaintiff"); Brady v. Cheltenham Township, 1998 WL 164994, *7 (E.D. Pa. Apr. 9, 1998) (finding that "scintilla of circumstantial evidence, absent more, is insufficient to support a rational jury's inference of racial discrimination" and that "[t]he evidence presented fail[ed] to bolster plaintiffs' conclusory allegations of racial animus, which are inadequate to create an issue of fact that would prevent the court from granting summary judgment" on section 1981 claims); Sampson v. Vill. Disc. Outlet, Inc., 832 F. Supp. 1163, 1167 (N.D. Ill. 1993) ("[T]he commission of an offense accompanied by a single racist remark will not sufficiently demonstrate that a racial animus

was a motivating factor of the offense."), aff'd, 43 F.3d 1474 (7th Cir. 1994).

Furthermore, Plaintiffs' argument that Bankowski had them banished in retaliation for their opposition to *what they believed in good faith* to be racial discrimination is unavailing. Plaintiffs' reaction under the circumstances was based on nothing more than an assumption that Bankowski was acting with racial animus when he escorted the girls out of the mall. The law does not elevate the rights of non-minority observers over those of minority members who suffer no discrimination. In other words, Plaintiffs have no greater rights than the children from whom their claim stems, and therefore their "good faith belief" rings hollow once it is shown, as here, that there is no significant probative evidence of underlying discrimination. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claims under 42 U.S.C. § 1981.[5]

Count II -- Violation of Plaintiffs' Free Speech Rights under the First and Fourteenth Amendments/42 U.S.C. § 1983

In Count II, Plaintiffs claim under 42 U.S.C. § 1983[6] that Defendants' actions violated their free

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5The Court's disposition of the issue of racial animus renders moot the ether issues pertinent to the section 1981 claims.

6This section provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

speech rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek relief from Wells Fargo and Acadia based on the actions of the employees of these entities -- security guard Andrew Bankowski and mall manager Debra Hardy, respectively.

As the Eleventh Circuit has noted, "A defendant cannot be held liable under section 1983 on a respondent superior or vicarious liability basis." Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992) (citing Monell v. Department of Social Servs., 436 U.S. 658, 98 S. Ct. 2018, 59 L.Ed.2d 611 (1978)). This rule applies to both municipal and private corporations. Harvey, 949 F.2d at 1130.[7]

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[7]The Court declines Plaintiffs' invitation to reject prevailing law on this point and to adopt a new rule allowing respondent superior liability for private corporations in section 1983 cases. Plaintiffs cite Taylor v. Plousis, 101 F. Supp. 2d 255 (D.N.J. 2000), for the proposition that respondent superior liability should apply to private corporations even though it does not extend to governmental entities. In a footnote, the Taylor court did question the policy behind extension of Monell to private corporations. 101 F. Supp. 2d at 263 n.4. However, the court acknowledged that "the majority of courts to have considered the issue have determined that. . . a [private] corporation may not be held vicariously liable under § 1983" and "accept[ed] the reasoning in these cases." 101 F. Supp. 2d at 263. If the rule is to be changed in this circuit, that task is for the Court of Appeals. Cf. Scutieri v. Estate of Revitz, 683 F. Supp. 795, 800 (S.D.

However, a corporation may be held liable for the unconstitutional acts of employees where there is a policy, custom, or action by those who represent official policy which causes the injury. See, e.g., Davis v. DeKalb County Sch. Dist., 233 F.3d 1367, 1375 (11th Cir. 2000) (noting that for municipality to be liable under section 1983 acts must be "acts which the municipality has officially sanctioned or ordered"); Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991) ("[I]n order to recover against a municipality, a plaintiff must establish that the alleged racial discrimination or harassment occurred pursuant to a custom or policy of the municipality."); Scutieri v. Estate of Revitz, 683 F. Supp. 795, 800 (S.D. Fla. 1988) (noting "exception to rule of no vicarious liability under Section 1983 where there is policy-making employee and there was a policy which was the moving force of the constitutional violation"). Although this Court found in ruling on the motions to dismiss that Plaintiffs had sufficiently *alleged* a custom or policy by the Defendants, the Plaintiffs have not *presented evidence* sufficient to survive the Defendants' motions for summary judgment on this issue. Considering the affidavits and depositions in the record, there is simply no evidence supporting Plaintiffs' claims that the actions taken by the individual employees of these corporate defendants constitute the official policies of those entities. Accordingly, the Plaintiffs' section 1983 claims fail.

The Court agrees with Defendants that Plaintiffs have not presented any evidence supporting their claim that Bankowski and Hardy implemented

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Fla. 1988) (discussing Monell and holding that "as a matter of law[] a private corporation cannot be liable strictly on the basis of a respondeat superior theory under Section 1983").

a policy, custom, or practice of their employers to discriminate based on race or to retaliate against those who oppose such discrimination. First, as discussed above in connection with the section 1981 claim, there is no evidence that Hardy or anyone at Acadia participated in the November 20, 1998 incident or was even aware of the alleged discrimination until after this suit was filed. Hence, even assuming arguendo that Hardy is a policy-making employee -- a conclusion which is not supported by the evidence -- there are no actions by Hardy which could trigger liability for Acadia, nor is there any evidence of a discriminatory Acadia policy. Additionally, there is no support in the record for Plaintiffs' contention that Wells Fargo's security guard, Bankowski, was a policy-making employee or that he acted pursuant to a corporate policy of discrimination. Plaintiffs' bare, conclusory allegations of the existence of such a policy are insufficient to raise an issue of fact, and Defendants have met their burden of establishing the absence of a genuine issue of material fact as to the existence of a custom or policy. Accordingly, Defendants' motions for summary judgment on the section 1983 claims shall be granted.[8]

III. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant, Acadia Realty Trust Inc.'s Motion

8In light of the disposition of the respondeat superior liability issue, the Court finds it unnecessary to reach the remaining issues on the section 1983 claims, including Plaintiffs' standing and whether Acadia and Wells Fargo were state actors in the context of this litigation.

for Final Summary Judgment (Doc. 106) is **GRANTED.**

2. Defendant Wells Fargo Guard Services, Inc.'s Dispositive Cross Motion for Summary Judgment (Doc. 139) is **GRANTED.**

3. Plaintiffs' Motion for Partial Summary Judgment Against Defendants Acadia Realty Trust, Searstown Mall Association, and Wells Fargo of Florida Guard Services (Doc. 98) is **DENIED.**

4. Plaintiffs' Second Motion for Partial Summary Judgment (Doc. 178) is **DENIED.**

5. All other pending motions are **DENIED as moot.**

6. The Clerk is directed to enter judgment for Acadia Realty Trust, Inc. and Wells Fargo Guard Service, Inc. of Florida in accordance with this Order and thereafter to close the file.

DONE and **ORDERED** in Orlando, Florida this 9th day of March, 2001.

_____

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,

Plaintiffs,

-vs- Case No. 6:99-cv-110-Orl-99A

ACADIA REALTY TRUST, INC., et al.,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: **DEFENDANT ACADIA REALTY TRUST, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No.58)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

MOTION: **DEFENDANT SEARSTOWN MALL ASSOCIATION, INC.'S MOTION TO DISMISS PLAINTIFFS THIRD AMENDED COMPLAINT (Docket No. 59)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part, and DENIED in part.**

MOTION: **DEFENDANT CITY OF TITUSVILLE'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No. 61)**

FILED: **NOVEMBER 22, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

MOTION: **DEFENDANT WELL FARGO GUARD SERVICE, INC'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT (Docket No. 63)**

FILED: **DECEMBER 1, 1999**

THEREON it is **RESPECTFULLY RECOMMENDED** that the motion be **GRANTED in part and DENIED in part.**

I. PROCEDURAL HISTORY.

Plaintiffs Helen Edwards and Christopher Edwards ("Plaintiffs") filed their first complaint on February 1, 1999 against Defendants Acadia Realty Trust, Inc. (" Acadia"), and the City of Titusville (the "City") alleging violation of constitutional and civil rights. (Docket No.1). Plaintiffs also claimed civil conspiracy and negligent training and supervision against Acadia. (*Id.).* Plaintiffs filed a first and second amended complaint adding SearsTown Mall Association, Inc. ("STMA "), and Wells Fargo Guard Service, Inc. ("Wells Fargo"), respectively, as

defendants to all claims previously alleged. (Docket Nos. 5 & 38). The Honorable G. Kendall Sharp, United States District Judge, struck Plaintiffs' second amended complaint. (Docket No.56). Plaintiffs filed a third amended complaint against all defendants alleging the following: Count I -race-based denial of public accommodation under 42 U.S.C. § 1981; Count II - violation of rights of free speech, petition and association under First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983; Count III - race-based denial of public accommodation under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983; Count IV - conspiracy to deny rights under 42 U.S.C. § 1985(3); and Count V - violation of 42 U.S.C. § 1986. (Docket No.57). Plaintiffs requested equitable and injunctive relief including damages, costs and attorney's fees. (*Id.*). Acadia, STMA, the City and Wells Fargo filed motions to dismiss and Plaintiffs responded to those motions. (Docket Nos. 58, 59,61,63,66-69 & 71). Wells Fargo filed a notice of supplemental authority in support of its motion. (Docket No.71).

II. STATEMENT OF FACTS.

Plaintiffs reside in Titusville, Florida and are "not of the Negro race." (Docket No.57 ¶2). Acadia is a Pennsylvania corporation which owned the SearsTown mall in Titusville, Florida until February 1, 1999. (*Id.* ¶ 3). In February 1999, STMA became the owner and operator of the SearsTown mall. (*Id.* ¶4). Wells Fargo provided security guard service for the SearsTown mall. (*Id.* ¶6).

On or about November 20, 1998, Plaintiffs witnessed security guards at the SearsTown mall verbally abuse and harass black children in the mall. (Docket No.57 ¶7). The guards did not harass white children for the same or worse behavior. (*Id.* ¶7). Plaintiffs disapproved of the guards' behavior and told

one of the guards that the guards should stop discriminating against the black children. (*Id.* ¶9). One guard brandished a large, heavy flashlight, told Plaintiffs to "shut up" and leave the mall, and the guard informed them that he was going to call the police. (*Id.* ¶10). The police then "trespassed" Plaintiffs, meaning that Plaintiffs were banned from the mall for two years. (*Id.* ¶¶11 & 12). The police indicated that they had no discretion in enforcing the mall owner's request for someone to be "trespassed."[1] (*Id.* ¶53).

During its ownership of the mall, Acadia refused to rescind the "trespass." (Docket No.57 ¶13). After STMA acquired the mall, it initially refused to rescind the "trespass." (*Id.* ¶14). However, on February 19, 1999, STMA rescinded the "trespass" against Plaintiffs. (Docket No. 77, attachment). On February 23, 1999, the City informed Plaintiffs that the trespass had been withdrawn. (*Id.*).

Plaintiffs alleged that Defendants' actions were based on racial animus and animus toward people opposing racial discrimination. (Docket No.57 ¶17). Plaintiffs also alleged that the police acted pursuant to a "municipal policy and custom to automatically implement and enforce the demands of property owners and the agents of property owners to eject and banish people from those owners' property; even if, as

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1Florida's trespass law provides in relevant part as follows:

> A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance...as to which notice against entering and remaining is given...by actual communication to the offender... commits the offense of trespass ...." Fla. Stat. § 810.09 (1)(a)1.

is the case regarding Plaintiffs, such demands are based on a racially discriminatory motive and the property is a place of public accommodation." (*Id.* ¶18). Plaintiffs further alleged that Defendants' conduct "implement[ed] or execute[d] a custom, policy statement, regulation, or decision officially adopted and promulgated by each Defendants' officers to maximize profits, avoid accountability, and/or evade regulations and duties regarding people who oppose discrimination." (*Id.* ¶33).

III. STANDARD OF REVIEW.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 45-46 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). However, in the context of civil rights, there is a heightened pleading requirement and the plaintiff must "allege with some specificity the facts which make out its claim." *GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359,1367 (11th Cir. 1998).

IV. ANALYSIS.

A. *Standing.*

Acadia, STMA and Wells Fargo contended that Plaintiffs did not have standing to raise any civil rights claims because Plaintiffs were claiming damages for harm that occurred to others. They contended that Plaintiffs did not "suffer[] an injury-in-fact that would be corrected by a favorable decision in the lawsuit." *Church v. City of Huntsville*, 30 F.3d 1332,1335 (11th Cir. 1994). Plaintiffs argued that they did have standing because they were damaged

by their exclusion from the mall for approximately three months.

"[R]acial discrimination motivated by anti-black feeling but directed against whites is actionable." *Gordon v. City of Cartersville*, 522 F. Supp. 753, 756 (N.D. Ga. 1981)(citations omitted). Several courts have found that non-minorities have standing when the non-minorities are injured by racially motivated conduct. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229,237 (1969)(non-minority had standing to bring claim against subdivision that expelled non-minority for advocating the right of a black to lease the non-minority's house); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975)(non-minority had standing to bring suit when non-minority was refused employment because non-minority was married to a black person); *DeMatteis v. Eastman Kodak Co.*, 511 F .2d 306 (2nd Cir. 1975)(non-minority had standing to bring action against former employer who terminated him for selling non-minority's home to black); *Adler v. Columbia Historical Society*, 690 F. Supp. 9, 15 (D.D.C. 1988)("A white person who is injured as a result of his or her efforts to defend the rights of non-whites has standing to sue under [42 U.S.C.] § 1981."); *Riccobono v. Whitpain*,497 F. Supp. 1364 (E.D. Pa. 1980)(non-minority developer had standing to bring cause of action against defendants who denied permit for skating rink because they feared the rink would attract minorities). The essential issue in determining questions of standing is whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,38 (1976). Plaintiffs did not file suit on behalf of the minorities in the mall that they felt were treated unfairly. Instead, they sued for their own injuries which can be redressed by an award of damages.

SMTA and Wells Fargo urged the Court to find Plaintiffs lacked standing based on *Evans v. Kansas*

City, Missouri School District, 65 F .3d 98 (8th Cir. 1995). In *Evans*, a high school teacher was terminated after voicing objections to a new principal's plans for the school. The teacher was concerned about the effect of the plans on the school's students, 98% of whom were black. The teacher was unable to establish a claim under Title VII, 42 U.S.C. § 2000e-3(a), because the teacher had not opposed an unlawful employment practice, but had instead opposed a policy change for the school. The teacher then argued that 42 U.S.C. § 1981 was broader than Title VII and encompassed actions that fell outside of the employment relationship. The United States Court of Appeals for the Eighth Circuit found that only the affected students or their parents could bring a claim outside of the employment context. However, in the instant case, Plaintiffs did not seek relief for the minorities they felt were treated unfairly, but instead sought to recover for their own damages due to being "trespassed" from the mall for several months. Accordingly, Plaintiffs have standing to bring their claims.

B. *Counts II and III - Claims Under 42 US.C. § 1983.*

In Count II, Plaintiffs claimed violation of their rights of free speech, petition and association under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. In Count III, Plaintiffs claimed race-based denial of public accommodation under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Title 42 U.S.C. § 1983 provides in relevant part as follows

:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

Thus, to state a claim under 42 U .S.C. § 1983, Plaintiffs must allege: (1) acts committed by a person acting under color of state law; and (2) deprivation of rights, privileges or immunities guaranteed under the United States Constitution or the laws of the United States. *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992)(citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978)).

1. State Action.

Acadia, STMA and Wells Fargo contended that they were not state actors and thus could not be liable under 42 U.S.C. §1983 because they lacked the requisite action under color of law. "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Harvey*, 949 F.2d at 1130. The United States Court of Appeals for the Eleventh Circuit recognizes three tests to determine state action by a private actor. These are the public function test, the state compulsion test and the nexus/joint action test. *Id.*

The public function test shows private action to be state action if private actors are given the power to perform functions or do perform functions "that are 'traditionally the exclusive prerogative of the State.'" *Harvey*, 949 F.2d at 1131 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

Few activities fall within the exclusive powers[2] of the State. *Harvey*, 949 F.2d at 1131. The United States Court of Appeals for the Fifth Circuit has found that even detention and search of suspected shoplifters is not an exclusive function of the State. *White v. Scrivener Corp.*, 594 F.2d 140, 142-43 (5th Cir. 1979).[3] Other courts that have considered the actions of security guards have found their duties do not constitute state action. *See Wade v. Byles*, 83 F.3d 902,904 (7th Cir. 1996)(duties of lobby security guards did not constitute state action where the actions were "local in nature and limited in scope"); *United States v. Garlock*, 19 F .3d 441 (8th Cir. 1994)(investigation of crime does not transform private actor into a government actor). In the instant case, the actions of the Wells Fargo security guards did not amount to state action. Their duties were limited in scope and nature and did not intrude on those functions that were the exclusive province of the State. In addition, the actions of Acadia and STMA in refusing to allow Plaintiffs back into the mall after they had been "trespassed" did not amount to state action because they were not activities within the

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2The United States Supreme Court has found that activities such as election of public officials. Terry v. Adams, 345 U.S. 461,468-70 (1953), and operation of a company town, Marsh v. Alabama, 326 U.S. 501,505-09 (1946), constitute exclusive state powers.

3In Bonner v. City of Prichard, 661 F.2d 1206,1209 (11th Cir. 1981), the United States Court of Appeals for the Eleventh Circuit adopted all cases decided by the Fifth Circuit prior to October 1, 1981 as binding precedent.

exclusive power of the State. Thus, I find that the actions of Acadia, STMA and Wells Fargo did not amount to state action under the public function test.

As for the state compulsion test, Plaintiffs have not alleged in any manner how the State required, mandated or encouraged Acadia, STMA or Wells Fargo to undertake any actions that were discriminatory. Plaintiffs alleged that the existence of Florida' s trespass law required a finding of state action. However, "[a]bsent some compulsion or some overt state involvement, no state action can be found because of the mere existence of the statute." *White*, 594 F.2d at 143 (citing *Flagg Brothers*, 436 U.S. at 164). Accordingly, I find the actions of Acadia, STMA and Wells Fargo did not constitute state action under the state compulsion test.

The nexus/joint action test applies to situations where the "government has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.'" *Harvey*, 949 F.2d at 1131 (quoting *NBC v. Communication Workers of America, AFL-CIO*, 860 F.2d 1022,1026 (11th Cir. 1988)). To establish this type of state action under 42 U.S.C. § 1983, the plaintiff "must plead in detail, through reference to material facts, the relationship or nature of the conspiracy between the state actor(s) and the private persons." *Harvey*, 949 F.2d at 1133 (citing *Fullman v. Graddick*, 739 F.2d 553,556-57 (11th Cir. 1984)). Merely conclusory allegations are insufficient to establish state action through joint action. *Harvey*, 949 F.2d at 1133. Stringing together the steps of the events is insufficient without showing contacts between the actors that could prove the actors reached an understanding to violate Plaintiffs' rights. *Harvey*, 949 F.2d at 1133. In the instant case, Plaintiffs allege that the defendants acted "through their concerted acts and conspiracy," were "jointly engaged," and were "willing participants in joint activity." These are conclusory allegations that are not

supported by any specific factual allegations.

However, in *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit found that concerted action could transform private action into state action if the record showed that police did not conduct an independent investigation before making arrests based solely on the accusations of shopkeepers.[4] In the instant case, Plaintiffs alleged that there was a policy or custom to automatically implement and enforce the demands of property owners even if those requests were discriminatory .Under *Smith*, this allegation is sufficient to preclude dismissal based on lack of state action for Acadia and Wells Fargo.[5] However, it is insufficient as to STMA. Plaintiffs did not allege that the same agreement existed regarding STMA and the police or that STMA had any part in the original "trespassing" of Plaintiffs. Plaintiffs did not allege that part of this joint state action was that future owners would refuse to rescind previously

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4See also Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977).

5In the supplemental authority filed by Wells Fargo, LaFontant v. Burdines, Inc., No. 97-4102-CIV-GRAHAM, slip op. at 6 (S.D. Fla. Feb. 3, 1999), the United States District Court for the Southern District of Florida indicated that alleging a "meeting of the minds" was insufficient to show joint action for purposes of establishing state action. However, there was no evidence that the plaintiff in LaFontant alleged the type of automatic state action that was alleged by Plaintiffs in the instant case. Thus, the actions alleged in LaFontant would not fall within the ambit of Smith and are therefore distinguishable from the instant Plaintiffs' claims.

issued "trespass" orders. The only actions alleged against STMA, refusing to rescind a "trespass" already in place, did not convert STMA into a state actor. Thus, I respectfully recommend that the motion to dismiss STMA be GRANTED as to Counts II and III.

2. No Recovery Based on Respondeat Superior.

a. Acadia.

Acadia contended that Plaintiffs' claims against it should be dismissed because they were based upon a theory of *respondeat superior*, seeking to hold Acadia responsible for the actions of the security guards. "[A]s a matter of law, a private corporation cannot be liable strictly on the basis of a *respondeat superior* theory under Section 1983." *Scutieri v. Revitz*, 683 F. Supp. 795,800 (S.D. Fla. 1988); *see also Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972,975-76 (8th Cir. 1993)(corporation will only be held liable under § 1983 for its policies, not for actions of private parties). "Absent a 'policy, custom or action by those who represent official policy that inflicts injury actionable under § 1983, a corporate defendant will not be liable for the unconstitutional acts of its employees." *Rey v. Kmart Corp.*, No. 97-3912-CIV-GOLD, 1998 WL 656070 at * 5 (S.D. Fla. July 21, 1998)(quoting *Sanders*, 984 F .2d at 975). One unconstitutional action cannot support an inference that the action was taken pursuant to an illegal policy. *Iskander v. Village of Forest Park*, 690 F.2d 126, 128-29 (7th Cir. 1982).

Plaintiffs' claims against Acadia are based on its "trespassing" of them and its refusal to revoke the "trespass" when the events surrounding its issuance were explained. Plaintiffs alleged that Acadia' s conduct was pursuant to a custom or policy to maximize profits, avoid accountability, and evade regulations regarding people who opposed discrimination. Plaintiffs have alleged a custom or

policy of violating rights and evading duties to follow nondiscriminatory policies. This allegation is sufficient to withstand a motion to dismiss. Thus, I respectfully recommend that the motion to dismiss Acadia on this basis be DENIED.

b. The City

The City argued that Plaintiffs failed to plead sufficient facts to establish that the actions taken were pursuant to a municipal policy, practice or custom. Plaintiffs' claims against the City were based on its policy or custom of automatically trespassing someone at the request of the owner of the property without any investigation, even if the request was discriminatory.

Local governments can be sued directly under 42 U.S.C. § 1983 only if the actions that are alleged to be unconstitutional implement or execute a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers." *Monnell v. Dept. of Social Services*, 436 U.S. 658,690 (1978). A local government may also be sued for unconstitutional actions undertaken pursuant to a custom, "even though such a custom has not received formal approval through the body's official decision making channels." *Monnell*, 436 U.S. at 690-91.

Plaintiffs claimed the City had a custom or policy of automatically implementing and enforcing the demands of property owners to eject persons from their property even if such actions were discriminatory. They also alleged that the City was evading regulations and duties toward those who opposed discrimination and that these policies had been promulgated by the City's officers. Plaintiffs have sufficiently stated an allegation of the custom or policy required to withstand a motion to dismiss. Accordingly, the motion to dismiss the claims against the City on that basis should be DENIED.

3. Intention to Violate Rights of Free Speech. Petition and Association.[6]

a. Free Speech.

The City argued that even-handed enforcement of Florida' s trespass-after-warning statute did not violate Plaintiffs' rights to free speech, petition and association. "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. .. ." *Adderly v. State of Florida*, 385 U.S. 39,47 (1966). Plaintiffs alleged that they were retaliated against for their remarks to the guards concerning the impropriety of their conduct toward minorities. Plaintiffs alleged that the mall was a place of public accommodation and that the Defendants acted pursuant to a policy to evade regulations and duties toward those who opposed discrimination.

The United States Court of Appeals for the Eleventh Circuit has held that as applied to a nonpublic forum, Housing Authority property, Florida's trespass statute did not violate the First or Fourteenth Amendments to the United States Constitution. *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994). However, reading the complaint in the light most favorable to Plaintiffs, they contend that the mall is a place of public accommodation as opposed to the nonpublic forum in *Daniel*. The United States Supreme Court has addressed the issue of First Amendment activity within a mall in the context of the distribution of handbill invitations to a meeting to protest the draft and the Vietnam War. *Lloyd Corp.*

6The following analysis under 42 U.S.C. § 1983 only addresses actions of Acadia, Wells Fargo and the City because I have recommended that the motion to dismiss be granted as to STMA under Counts II and III.

v. Tanner, 407 U.S. 551 (1972). The Supreme Court found that the mall's strictly enforced policy of prohibiting handbilling did not violate the First Amendment rights of the handbillers where the handbilling was not related to any activities within the mall and where the handbillers had adequate alternative means of communication. In the instant case, Plaintiffs allegations concerned the activity within the mall itself. In addition, it does not appear that Plaintiffs' speech would have been effective had they been in any location other than within the mall where the discrimination occurred. Thus, Plaintiffs have stated a claim distinct from that in *Tanner*.

Even if the mall were found to be a nonpublic forum, the restrictions would need to be "content-neutral and reasonable" to pass constitutional muster. *Daniel*, 38 F. 3d at 550.[7] However, Plaintiffs specifically alleged that they were retaliated against because of the viewpoint expressed in their speech, namely, that they opposed discriminatory treatment of minorities. Thus, Plaintiffs have sufficiently stated a claim under the First Amendment as to their freedom of speech.

b. Freedom of Association.

Concerning freedom of association, Plaintiffs only alleged that Defendants desired to prevent Plaintiffs from exercising their rights of free speech, petition and association. Plaintiffs did not allege the type of association they were claiming with the

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7See also United States v. Kokinda, 497 U.S. 720,730 (1990)(in a nonpublic forum, distinctions concerning access must be reasonable and "viewpoint neutral")(quoting Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788,806 (1985)).

minorities or that they were associated with them for any purpose. The facts of the complaint do not even indicate if Plaintiffs spoke with the minorities or if the minorities were aware of Plaintiffs' actions.

The two forms of association which are protected under the Untied States Constitution are "intimate association" and "expressive association." *Cummings v. DeKalb County*, 24 F.3d 1349, 1354 (11th Cir. 1994)(quoting *McCabe v. Sharrett*, 12 F.3d 1558, 1562-63 (11th Cir. 1994)). Intimate association relates to those "personal relationships that attend the creation and sustenance of a family...." *McCabe*, 12 F.3d at 1563. Plaintiffs have not alleged any familial relationship with the minorities whose rights they were defending.

Expressive association concerns "the freedom to associate for the purpose of engaging in activities protected by the First Amendment. ..." *McCabe*, 12 F.3d at 1563. Plaintiffs have not alleged that they were associating with the minorities at all, and not for the purpose of expressing their First Amendment rights. Accordingly, I respectfully recommend that Plaintiffs' claims based on freedom of association be dismissed.

c. Freedom of Petition.

Plaintiffs claim that their rights to petition were violated by Defendants because Plaintiffs sought to petition the state actors, the Defendants, to stop segregation and discrimination. Plaintiffs also claimed that Defendants wanted to prevent Plaintiffs from petitioning the state unemployment benefits office. The United States Constitution protects the right to "petition the government for redress of grievances." U.S. Const. amend. I. The "Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches." Biddulph v. Mortham, 89 F.3d 1491,1496 (11th Cir.

1996)(citations omitted). The type of conduct complained of by Plaintiffs does not involve their right of petition to such government representatives. Regarding the access to the state unemployment office, Plaintiffs have not alleged that they were petitioning that office for a redress of any grievance. Accordingly, Plaintiffs have failed to state a claim under the First Amendment protection for rights of petitioning the government. Thus, I respectfully recommend that the claim under the First Amendment be dismissed as to violation of Plaintiffs' right of petition.

4. Violation of Equal Protection.

The City contended that Plaintiffs have failed to allege a violation of equal protection because Florida's trespass-after-warning statute was enforced uniformly. "A preliminary step in equal protection analysis is to determine whether persons who are similarly situated are subject to disparate treatment." *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995)(quoting *Johnson v. Smith*, 696 F.2d 1334, 1336 (11th Cir. 1983)). *See also E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)("Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause."). Although "an isolated event may contravene the equal protection clause if different action is taken against persons similarly situated without showing any rational basis for the disparate treatment," an equal protection claim "requires a showing of purposeful discrimination." *Smith v. State of Georgia*, 684 F.2d 729, 736 (11th Cir. 1982). Plaintiffs have not alleged that others who were similarly situated were treated differently than Plaintiffs. In fact, Plaintiffs' complaint alleged that all persons that the mall owner requested to have "trespassed" were in fact "trespassed" by the police. Thus, Plaintiffs have not shown they were treated any differently than any other person who was

trespassed or than any other person who arguably interfered with the guards' performance of their duties. Accordingly, I respectfully recommend that the motions to dismiss the claims based on violation of equal protection be GRANTED.

C. *Count I - Race-Based Denial of Public Accommodation Under 42 U.S.C. § 1981.*

Title 42 U.S.C. § 1981 provides in relevant part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (a), (c). Generally, the elements of a claim under 42 U.S.C. § 1981 include: (1) plaintiff is a member of a minority; (2) an intent to discriminate based on race by the defendant; and (3) the discrimination concerned an activity enumerated in the statute. *Baker v. McDonald's Corp.*, 686 F. Supp. 1474, 1481 (S.D. Fla. 1987). STMA contended that Plaintiffs failed to establish that they were discriminated against based on their own race. However, as discussed earlier, courts have allowed non-minorities to recover under 42 U.S.C. § 1981 when they are injured as a result of discriminatory

treatment of minorities.

STMA and Wells Fargo also argued that Plaintiffs failed to allege that they were discriminated against concerning any of the activities enumerated in 42 U.S.C. § 1981. Wells Fargo argued that Plaintiffs failed to sufficiently allege racial animus. Lastly, Acadia and STMA contended that if the Court found them to be state actors, no civil cause of action could be brought against them under 42 U.S.C. § 1981, but must instead be brought under 42 U.S.C. § 1983 pursuant to *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). The City, as an admitted state actor, also argued under *Jett* that any claim against it must be brought under 42 U.S.C. § 1983.

1. Enumerated Rights.

Plaintiffs sought to recover based on their being "trespassed" from the mall for several months because of their verbal defense of minorities in the mall. Title 42 U.S.C. § 1981 protects the right to "full and equal benefit of the laws," including the right to make contracts equally under the laws and be punished equally. Plaintiffs contend that they were punished in a discriminatory manner and were not treated equally with those who did not defend minorities. Their "trespass" from the mall also affected their ability to contract with merchants in the mall. Accordingly, Plaintiffs' complaint alleges violation of an enumerated activity and STMA 's and Wells Fargo's motions to dismiss on that basis should be DENIED.

2. Racial Animus.

Plaintiffs clearly alleged in their complaint that the actions of the Defendants were motivated by racial animus in that they were "trespassed" for defending the rights of minorities. The animus toward minorities affected Plaintiffs in that they were

punished for defending minorities' rights. Plaintiffs stated in their complaint that the Defendants acted willfully and intentionally against Plaintiffs because they opposed racial discrimination. Accordingly, I find that Plaintiffs clearly alleged racial animus against the Defendants. Thus, Wells Fargo's motion to dismiss on this basis should be DENIED.

3. Claims Against State Actors May Only Be Brought Under 42 U.S.C.§ 1983.

a. The City.

The City contended that claims against it could only be brought under 42 U.S.C. § 1983. "Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731. The United States Court of Appeals for the Ninth Circuit has held that the Civil Rights Act of 1991 overruled this portion of the *Jett* opinion. *Federation of African American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996). The United States Court of Appeals for the Eleventh Circuit has not addressed this question. However, "district courts within the Eleventh Circuit...have been unanimous in holding that the *Jett* rule remains unaltered, and a plaintiff may not bring § 1981 and § 1983 claims simultaneously against a municipal defendant." *Villanueva v. Fort Pierce*, 24 F. Supp. 1364, 1367 (S.D. Fla. 1998). Accordingly, I recommend that the City's motion to dismiss the § 1981 claim against it be GRANTED.

b. Acadia, STMA and Wells Fargo.

As to Acadia, STMA and Wells Fargo, as noted above, the conduct of Acadia and Wells Fargo has been sufficiently pled concerning state action to withstand a motion to dismiss. Accordingly, if Acadia

and Wells Fargo are found to be state actors, the claim under 42 U.S.C. § 1981 should be dismissed. However, if they are found not to be state actors, a cause of action under § 1981 could be maintained. Accordingly, I recommend that as to Acadia and Wells Fargo, the motion to dismiss Count I be DENIED and that the claim be allowed as alternative pleading at this stage of the case. Previously in this order, I found that Plaintiffs had failed to sufficiently plead state action as to STMA. Accordingly, the § 1981 claim should not be dismissed against STMA on that basis.

D. Count IV -Conspiracy to Deny Rights Under 42 U.S.C. § 1985(3).

Title 42 U.S.C. § 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws
> ...or if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property , or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

To establish a claim under § 1985(3), a plaintiff must show the following: "(1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the

conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996)(citing *Lucero v. Operation Rescue*, 954 F.2d 624,627 (11th Cir. 1992); *see also Park v. Atlanta*, 120 F.3d 1157, 1161 (11th Cir. 1997). The second element of the claim requires a showing of racial or other class-based discriminatory animus. *Childree*, 92 F.3d at 1147.

Acadia, STMA, the City and Wells Fargo argued that Plaintiffs failed to sufficiently allege specific factual predicates for the conspiracy, failed to show racial animus and failed to allege that the Plaintiffs were members of a protected class. Plaintiffs alleged in their complaint that the Defendants met and reached an agreement to injure Plaintiffs. "The existence of a conspiracy may be proven by circumstantial evidence and a plaintiff must simply plead general facts from which a conspiracy can be inferred to withstand a [Fed. R. Civ. P.] 12(b)(6) motion." *Arnold v. Board of Educ. of Escambia County, Alabama*, 880 F.2d 305,317 (11th Cir. 1989)(citing *Quinones v. Szorc*, 771 F.2d 289,291 (7th Cir. 1985)). Plaintiffs have not pleaded even general facts sufficient to support a conspiracy claim. Because Plaintiffs have "failed to proffer admissible proof of such a conspiracy," the conspiracy claim should be dismissed. *Park*, 120 F.3d at 1161. Thus, I recommend that the motion to dismiss the claim against all Defendants under 42 U.S.C. § 1985(3) be GRANTED.

E. Count V- Violation of 42 U.S.C. § 1986.

Title 42 U.S.C. § 1986 provides in relevant part as follows:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured....

Acadia, STMA and Wells Fargo contended that because Plaintiffs failed to establish a conspiracy, the claim under 42 U.S.C. § 1986 necessarily failed. The City contended that even if police were aware of a conspiracy, they were powerless to prevent such conspiracy or to prevent its implementation. Section 1986 "only provides a cause of action in the existence of a § 1985(3) conspiracy...." *Park*, 120 F.3d at 1160. Accordingly, since Plaintiffs failed to sufficiently allege a cause of action under 42 U.S.C. § 1985(3), they cannot recover under 42 U.S.C. § 1986. Thus, I respectfully recommend that the motions to dismiss Count V be GRANTED.

F. Request for Injunctive Relief.

In their complaint, Plaintiffs demanded injunctive relief. However, in a later pleading, Plaintiffs asserted that the rescinding of the "trespass" nullified the need for the "order requested by Plaintiffs from this Court to rescind the banishments." (Docket No.77 at 2). The only order referred to and requested had been Plaintiffs' application for preliminary injunction. (*Id.*). In Plaintiffs' complaint, Plaintiffs did not specify what type of injunctive relief they sought, once the "trespass" has been rescinded.

In *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967), the United States Court of Appeals for the Fifth Circuit found that an action to enjoin a restaurant's refusal to serve a customer who ate with blacks was not moot when the restaurant agreed to allow the customer to once again dine in the restaurant. Because there was a long history of the restaurant allowing the customer to dine and then refusing to allow him to dine, the Fifth Circuit found that there was an ongoing controversy and the case should be heard. Contrary to *Offner*, in the instant case, Plaintiffs have not shown such an ongoing controversy and the claim for injunctive relief should be dismissed as moot. Therefore, I respectfully recommend that the motions to dismiss Plaintiffs' claims for injunctive relief be GRANTED.

V. CONCLUSION.

Based on the foregoing, I respectfully recommend the following: (1) that the motion to dismiss Count I be GRANTED as to the City; (2) that the motion to dismiss Count II be GRANTED as to STMA; (3) that the motions to dismiss Count II be GRANTED as to Acadia, the City and Wells Fargo on Plaintiffs' claims of freedom of association and right to petition; (4) that the motions to dismiss Count III be GRANTED as to Acadia, STMA, the City and Wells Fargo; (5) that the motions to dismiss Counts IV and V be GRANTED as to Acadia, STMA, Wells Fargo and the City; (6) that the motions to dismiss Plaintiffs' claims for injunctive relief GRANTED; and (7) that the motions to dismiss be DENIED in all other respects.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida this 15th of May, 2000.

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Parties

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12909-JJ

HELEN EDWARDS,
CHRISTOPHER EDWARDS

Plaintiffs-Appellants,

versus

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC. OF FLORIDA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: WILSON, HILL AND FAY, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HELEN EDWARDS, et al.,

Piaintiffs,

-vs- Case No. 6:99-cv-110-Orl-28KRS

ACADIA REALTY TRUST, INC., et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Plaintiffs' Motion to Alter or Amend Judgment (Doc 225, filed March 23, 2001).

Having considered Plaintiffs' Motion (Doc. 225), Plaintiffs' Memorandum of Law in Support of Their Motion to Alter or Amend Judgment (Doc. 226), Defendant, Acadia Realty Trust, Inc.'s Response to Plaintiff's [sic] Motion to Alter or Amend Judgment and Incorporate Memorandum of Law (Doc. 233), and Defendant Wells Fargo Guard Services, Inc.'s Response in Opposition to Plaintiffs' Motion to Alter or Amend Judgment (Doc. 237), the Court finds no basis to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). There has not been an intervening change in controlling law, no new evidence has become available, and the Court finds "'no need to correct clear error or prevent manifest injustice.'" Coppage v. United States Postal Serv., 129 F. Supp. 2d 1378,1379 (M.D. Ga. 2001) (quoting Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla 1994)).

Accordingly, it is **ORDERED** and **ADJUDGED** that Plaintiffs' Motion to Alter or Amend Judgment (Doc. 225, filed March 23, 2001) is **DENIED.**

DONE and **ORDERED** in Chambers, Orlando, Florida this 17 [sic] day of April, 2001.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> **(1)** To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> **(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> **(4)** To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....